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**Sent:** Wed 9/24/2008 11:33:52 PM  
**Subject:** Comments due Oct. 1 on amendments to Delta Fishes / 4 Pumps Agreement, part of revised OCAP BA  
[092208\\_DRAFT\\_DWR and DFGVersion\\_Delta Fish Agreement Amendment.pdf](#)

Dear all,

Attached is are the proposed amendments to the 1986 Delta Fishes / 4 Pumps agreement, which are intended to be part of the revised OCAP BA submitted by the Bureau to the Services in the next several weeks. DWR and DFG have been negotiating these amendments for months, trying to reach agreement with the water contractors to determine what would constitute "full" mitigation for the direct and indirect impacts of the SWP pumps under CESA, during the next 10 years (the life of this amendment to the existing Agreement).

There are two principle elements to the Amendment. First, the amendments address the impacts of the pumps to pelagic fish species by requiring restoration of a certain amount of intertidal or shallow subtidal habitat, based on DFG analysis of the particle tracking study by Kimmerer and Nobriga (2008). The amount of habitat required to be restored depends on the E:I ratio required by the OCAP BO. The document identifies several specific habitat restoration / mitigation projects, primarily focused on Prospect Island, Liberty Island, and Hill Slough West Tidal Marsh. Second, the amendments require restoration of Battle Creek and other ongoing mitigation actions upstream from the Delta, without any analysis of how these were calculated to constitute full mitigation and without any actions in the Delta.

This amendment to the agreement is also intended to be an early implementation action under the BDCP.

The document states that "the actual E:I ratio used to determine the amount of aquatic habitat in the Delta and Suisan March required by DFG as mitigation pursuant to this Amendment will be determined by the final OCAP BiOps and is expected to be between 0.17 and 0.35, depending on operational constraints." Notwithstanding this statement, I am concerned that the Departments and water users will try to argue that the habitat restoration measures in this agreement, without any pumping or additional restrictions on operations, will be sufficient for the Services to issue no jeopardy biological opinions for OCAP. Of course, there is a huge problem with this argument under the Ninth Circuit's 2007 and 2008 rulings in NWF v. NMFS II (regarding short term jeopardy and long term mitigation measures), but that's an issue for OCAP, and not something we need to tackle in commenting on this agreement...

The Departments are trying to get the Delta Fishes Advisory Committee to sign off on this amendment in early October, so comments are due by Wednesday, Oct. 1 at noon. I have read through the amendment and have a number of significant concerns, which I've identified below, but obviously your input would be critically important in identifying the most important issues (both the ones I've missed as well as the ones I've misidentified or misunderstood). FYI, we may have some leverage on the committee, as I believe CSPA, PCFFA, and other fishing groups are on the committee, and we could make a play to get the Committee to vote against approval.

Below are my initial concerns with the documents. I would love to get any input from y'all about this in the next couple of days, before comments are due. If folks are interested, I'm happy to set up a conference call to discuss this. Any help is greatly appreciated. Sorry for the short time period for your review, but the document was released earlier this week.

Thanks,

Doug

#### Initial Concerns with the Amendment to the Delta Fishes / Four Pumps Agreement (DRAFT)

- 1) The amount of habitat restoration required under the agreement appears to only consider impacts during the Feb 1 – June 30 period when E:I ratio is set to 0.35 under D-1641, and does not appear to address any impacts for the rest of the year, when the E:I ratio is 0.65. (See page 15) Given the percentage of particles lost at many of the sites under a 0.65 E:I ratio, this may result in significantly underestimating indirect impacts of the pumps, particularly on primary productivity, as well as on other species moving through the Delta during the summer and fall months. (See page 23) This is particularly true for Longfin smelt. (Page 20)
- 2) The amendment does not include any measures to provide open water habitat for the pelagic species, requiring only subtidal and marsh habitat restoration.
- 3) With respect to salmon, steelhead and other anadromous species, there does not appear to be any analysis nor mitigation for entrainment and indirect losses of salmon and steelhead in the Delta; there is no methodology for how DFG/DWR calculated the impacts to these species and figured out how the proposed mitigation measures address impacts to anadromous species, all salmon mitigation measures are upstream from the Delta (Battle Creek, a few other projects). (See page 10, 12)
- 4) The amendment does not require effective screening of the SWP facilities that meets DFG's fish screening criteria. Not surprising, but given that Delta Vision is recommending dual conveyance, and the pumps are likely to continue in operation for at least the next 10-20 years while any alternative conveyance is constructed, I'm struck by the failure to address the root of the problem and instead mitigate for it.
- 5) The amendment also appears to only address impacts to winter and spring run Chinook, and not to fall run Chinook or steelhead (page 3).
- 6) On page 13, the Amendment proposes to allow funding of a Delta Smelt refugia facility of \$1.5M / year for 10 years to be credited towards the habitat restoration requirements. Coincidentally, its expected to cost ~\$15-20M to build a new delta smelt hatchery. This is something that I believe we will strongly oppose, in line with our opposition to SB 994.

7) The Amendment proposes that all specific habitat restoration measures would undergo CEQA analysis, DRERIP analysis, and peer review when the specific project is proposed (page 11). However, it is unclear whether the overall model and amount of habitat restoration, as well as the specific measures proposed in the document, have undergone any analysis under DRERIP or have undergone peer review. This seems like a logical prerequisite before determining that it constitutes full mitigation.

8) Equally important, the document also allows DFG to avoid all these evaluation criteria (DRERIP, Peer Review, etc.) and approve projects in its sole discretion. (See page 13)

9) The Amendment does not address impacts to delta smelt critical habitat (pages 20-21).

10) The amendment only addresses impacts from the SWP facilities (and CVP water that is pumped through the SWP pumps), without addressing the CVP pumps. This is more a limitation of the agreement than any indication that there is no legal requirement for the CVP to comply with CESA (an outstanding legal issue that we may want to tackle). (page 15)

11) There is a discussion of indirect impacts of the SWP pumps on salmon on Page 20 that we may want to include in our OCAP comments, although it is based on older studies and may be old news to everyone but myself. I am still trying to obtain details of the recent radio tagging studies by NMFS, finding that 60% of juvenile salmon were lost before getting to the Delta (unpublished).

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